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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 324

HOME FURNITURE COMPANY, GEORGE H. PARK, AND JAMES F. KILCREASE, ETC., *Appellants.*

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, THE SOUTHERN PACIFIC COMPANY, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANTS.

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EDWARD C. WADE, Jr.,
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El Paso, Texas.

INDEX

CASES AND AUTHORITIES CITED

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STATEMENT OF THE CASE

Introductory Statement.

This is an appeal from a final decree of the United States District Court for the Western District of Texas, El Paso Division, dated January 10, 1925, in a suit instituted by the Home Furniture Company, a co-partnership, and George H. Park and James F. Kilcrease, individually and as partners in trade, composing the partnership of and doing business under the firm name and style of Home Furniture Company, plaintiffs, against The United States of America, The Interstate Com-

merce Commission, The Southern Pacific Company, a corporation, and El Paso & Southwestern Railroad Company, a corporation, defendants. The purpose of the suit was to set aside an order of The Interstate Commerce Commission authorizing, among other things, the acquisition by The Southern Pacific Company of control of the carriers comprising the El Paso & Southwestern System, by stock ownership through purchase of the interest of the El Paso & Southwestern Company therein and by lease approved and authorized. The suit also had for its purpose the suspension of said order of The Interstate Commerce Commission by means of an injunction, pending the litigation.

The lower Court held, it appearing upon the face of the Complaint that the residence of the defendant The Southern Pacific Company, a corporation, is in the State of Kentucky, and the residence of the defendant the El Paso & Southwestern Railroad Company, a corporation, is in the State of Arizona, and the order sought to be suspended and its operation, execution and enforcement restrained, was granted by The Interstate Commerce Commission on the application of said two defendant railroad companies, that the venue of said suit was in the State of Arizona or in the State of Kentucky and that the United States District Court for the Western District of Texas was without jurisdiction of the suit.

Final decree was entered on January 10, 1925, dismissing complainants' bill of complaint, and from this decree complainants appeal.

The case involves a construction of the Act of Congress of October 22, 1913, chapter 32, 38 Stat. L. 219; Volume 5 Federal Statutes Annotated, pages 1108 (Second Edition), fixing venue in this class of cases.

The complainants contend that this suit was properly instituted in the District Court for the Western District of Texas under the terms of the said Section and that the lower court was in error in dismissing complainants' bill of complaint and in holding that the venue of the suit was in the State of Kentucky or in the State of Arizona. The errors assigned are for the purpose of raising these questions.

Bill of Complaint.

The bill of complaint was filed in the lower court on October 23, 1924, and is set forth in extenso on pages 1 to 32 of the Record.

The bill among other things alleges:

That the plaintiffs are resident-citizens and tax-payers of the City of El Paso, County of El Paso and State of Texas and reside within the Western District of Texas, El Paso Division;

That the defendant The Southern Pacific Company is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and is authorized to and does operate railroads in the States of Oregon, California, Nevada, Utah, Arizona and New Mexico, and a line of steamships between the cities of Galveston, Texas, and New Or-

leans, Louisiana, and the City of New York, and is authorized to operate railroads in any other state of the United States, and is a carrier by railroad engaged in the transportation of passengers and property subject to The Interstate Commerce Act; that the defendant El Paso & Southwestern Railroad Company is a corporation incorporated under the laws of the State of Arizona and is authorized to and does operate railroads in the States of Ariozna, New Mexico and Texas and said defendant is engaged in the transportation of passengers and property in interstate commerce, subject to the Interstate Commerce Act; that defendant El Paso & Southwestern Railroad Company is part of what is known as the El Paso & Southwestern Railway System, consisting of a number of railroad companies, all referred to for convenience sake as the Southwestern System;

That the plaintiffs are and have been for several years last past engaged in the furniture business with their principal place of business at El Paso, Texas, and in connection with and as a part of said business buy and sell new and second-hand furniture in different parts of the United States, including New Mexico and Arizona; that plaintiffs in connection with said business for several years last past have been and are now purchasing furniture from business houses in Chicago, Illinois, and other cities in the eastern portion of the United States, and have caused said furniture to be shipped from said cities over the lines of the Chicago, Rock Island and Pacific Railroad, and the lines of the El Paso & South-

western Railroad to El Paso, Texas, for delivery to plaintiffs; that plaintiffs for several years last passed have sold large quantities of furniture, both new and secondhand, and have shipped the same to customers in New Mexico, Arizona and West Texas, and in doing so have used the lines of the Southern Pacific and the El Paso & Southwestern Railway System; and that plaintiffs are now engaged in the business of shipping furniture to Arizona, New Mexico and West Texas and in using the lines of said railway systems for that purpose, are engaged in shipping goods, wares and merchandise in interstate commerce.

The bill further sets forth the proceedings before The Interstate Commerce Commission with reference to the application filed before that Body by The Southern Pacific Company and the El Paso & Southwestern Railroad Company under paragraph 2 of Section 5 of the Transportation Act of 1920 for an order approving and authorizing acquisition by The Southern Pacific Company of control of the El Paso & Southwestern System by stock ownership through purchase of the interest therein of the El Paso & Southwestern Company, and alleges that said application culminated in an order and report of a Division of the Interstate Commerce Commission, composed of three commissioners, two of said Commissioners in effect approving said application and the third Commissioner dissenting from the report of the majority and finding in substance and effect that the authorization granted by the other two Commissioners was in violation of the letter

and the spirit of the law and in excess of the authority of the Commission.

The bill further sets forth that as a result of said report and decision, an order of the said Division was made, dated the 30th day of September, A. D. 1924, in effect authorizing among other things the acquisition of control by the Southern Pacific Company of the Southwestern System. As exhibits to the bill of complaint are attached: (1) The agreement between the railroad companies under which the proposed acquisition of control is sought to be authorized. (See Exhibit "A" page 16 et seq. of Record); (2) The order of the Interstate Commerce Commission authorizing the acquisition by The Southern Pacific Company of control of the carriers comprising the El Paso & Southwestern System, by stock ownership, (Exhibit "C" pages 23 et seq., of Record); (3) Report of Division 4 authorizing application, (Exhibit "C" pages 24 et seq., of Record); and (4) Dissenting opinion of Commissioner Eastman. (Exhibit "C", page 30 of record).

The bill attacks the findings, order and certificate of The Interstate Commerce Commission and alleges that The Interstate Commerce Commission exceeded its power and authority delegated to it by the Interstate Commerce Act and the Transportation Act of 1920 and erred in matters of law as specifically set forth in paragraph 13 of the said Bill. (Page 8 of Record).

The bill further alleges the invalidity of the findings, order and certificate of The Interstate Commerce Commis-

sion on divers other grounds, among others, in substance, being:

(1) Invalidity of a portion of the Transportation Act of 1920 because in conflict with Sections 5 and 6 of Article 10 of the Constitution of the State of Texas.

(2) Invalidity of a portion of the Transportation Act of 1920 because in conflict with Section 201 of the Constitution of the State of Kentucky of 1891;

(3) That the Commission by its order exceeded its power and authority in endeavoring to permit an acquisition, consolidation and merger in violation of both the spirit and letter of the Transportation Act of 1920, in that said Act provides that competition shall be preserved as fully as possible and said order supresses and stifles competition between the two systems in the manner set forth;

(4) That said order permits the consolidation of two systems of railroad under the terms of the Transportation Act of 1920 in advance of the complete plan of consolidation called for by said Act, which plan has not yet been promulgated by the Commission, and said authorization is premature and in excess of the power conferred upon it by Congress;

(5) That said order permits the fusing of two systems of railroad under the terms of paragraph 2 of Article 5 of the Transportation Act of 1920, which paragraph confers no power on the Commission to permit an acquisition by one car-

rier of the control of another carrier, either under a lease or by the purchase of stock in a manner involving the consolidation of such carriers into a single system for ownership and operation;

(6) That said order permits the fusing of two systems of railroad as a "piece-meal" consolidation, on the assumption that it is in conformity and harmony with a "tenative plan" of the Commission, whereas the final plan contemplated by the Transportation Act has not yet been adopted by the Commission;

(7) That said order permits the fusing of two railroads systems in violation of the plain intent and purpose of paragraph 2 of Section 5 of the Transportation Act of 1920;

(8) That said order permits the fusing of two systems of railroad in competition wit heach other in violation of the terms of the so-called Clayton Anti-Trust Act, and particularly in violation of Section 7 thereof;

(9) That said order is null and void because not in the public interest.

Complainants by their bill pray that said order may be held to be illegal and void and may be enjoined, set aside and suspended; that a restraining order and a preliminary injunction be granted restraining the enforcement of said order during the pendency of the case; and that upon final hearing a final injunction be granted permanently enjoining the enforcement of the said order.

Presentation of Bill of Complaint to Court.

On October 27, 1924, the bill was presented to the lower court, then presided over by Judge Colin Neblett, and oral motion made by the complainants that the court call to its assistance two other judges in order that the complainants might present their application to said three judges for an injunction suspending and restraining the enforcement, operation and execution of the order of The Interstate Commerce Commission aforesaid. (See page 32 of Record.) The Court after having heard the bill of complaint read and the arguments of counsel on the oral motion aforesaid, denied said motion on the ground that it appeared from the complaint that the residence of the defendant, The Southern Pacific Company, is in the State of Kentucky and the residence of the defendant the El Paso & Southwestern Railroad Company is in the State of Arizona, and the order sought by complainants to be sustained was granted by The Interstate Commerce Commission on the application of said two defendants, the court holding that it was without jurisdiction to grant the application.

Pleas to the Jurisdiction.

On November 15, 1924, the Defendants, The Southern Pacific Company and El Paso & Southwestern Railroad Company, filed their plea to the jurisdiction. (See page 33 of Record). On November 17, 1924, the United States of America and The Interstate Commerce Commission likewise filed a plea to the jurisdiction. (See page 34 of record). Both pleas

asserted that the venue of the suit is not in the District Court of the United States for the Western District of Texas, but is in the District Court of the United States for the District of Arizona or in the District of Kentucky, and prayed that complainants' Bill be dismissed.

Order of Judge Atwell Setting for Hearing the Pleas to the Jurisdiction.

On December 16, 1924, the complainants appeared before the said District Court of the United States for the Western District of Texas, then presided over by Judge Wm. H. Atwell, and asked the Court to call to his assistance two other judges to hear and rule upon the pleas to the jurisdiction. (See page 35 of Record). After hearing arguments of counsel, Judge Atwell set the case for hearing on January 10, 1925, at 11 o'clock A. M. at New Orleans, Louisiana, on the pleas to the jurisdiction, before himself and Hon. Richard W. Walker, Senior Circuit Judge of the 5th Circuit, and Hon. Du Val West, District Judge for the Western District of Texas. (See opinion and order, pages 35 et seq., of Record).

Final Decree.

The cause came on to be heard on the pleas to the jurisdiction on the 10th day of January, 1925, before the three judges mentioned in the last paragraph above, and the Court having heard the arguments of counsel sustained said pleas and dismissed complainants' bill of complaint and entered its Final Decree to that effect. (See page 39 of record).

Appeal.

On February 25, 1925, petition was made for an appeal from said Final Decree and an order entered allowing said appeal. (See page 40 of Record). Bond on appeal was given and citation issued. Stipulation was filed specifying the portions of record to be printed.

ASSIGNMENTS OF ERROR.

The assignments of error filed on February 16, 1925, (See page 39 of Record) upon which it is sought to have the final decree of January 15, 1925, reversed, set forth the following grounds of error:

I.

Because the court erred in holding that the order of The Interstate Commerce Commission referred to in said decree related to transportation.

II.

Because the court erred in sustaining the pleas to the jurisdiction and the venue filed by the defendants.

III.

Because the Court erred in holding that it had no jurisdiction to proceed with the cause.

IV.

Because the court erred in entering the final judgment herein dismissing complainants' Bill of Complaint.

ARGUMENT

The Venue of This Suit Lies in the Western District of Texas.

The four Assignments of Error complain of the action of the lower court in holding that it had no jurisdiction of the cause, and in dismissing the bill on that ground. The assignments will, therefore, be treated together and as presenting the same question.

This suit, having for its principal purpose the suspension and setting aside of an order of The Interstatae Commerce Commission, was brought by complainants in the District Court for the Western District of Texas, El Paso Division, under the following Section of the Federal Statutes:

"The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of The Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office.

In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment."

The section in question is taken from the Act of October 22, 1913, page 32, 38 Stat. L. 219, Volume 5 Federal Statutes Annotated p. 1108, Second Edition).

It is clear from the record that the plaintiffs in the Court below reside within the Western District of Texas and have their principal office and place of business in the City of El Paso, County of El Paso and State of Texas and within the Western District of Texas.

It is likewise clear that The Southern Pacific Company is a corporation organized and existing under and by virtue of the laws of the State of Kentucky and operated lines of railroad in a number of the States; also that the defendant railroad company, El Paso & Southwestern Railroad Company, is a corporation, incorporated under the laws of the State of Arizona and operates railroads in the States of Arizona, New Mexico and Texas.

The appellants assert that under the paragraph quoted above, the venue of this suit lies at the place of their residence, to-wit, within the Western District of Texas, for the following reasons: first, the order of the Interstate Commerce Commission does not relate to transportation; second, if there was a matter complained of before The Interstate Commerce Commission, that matter arose in the said District; third, if there was no matter complained of before the Commission, the mat-

ter covered by the order was deemed to arise in said district, because the petitioners in this suit have their principal place of business at El Paso, within said District. These propositions will be discussed in their order.

FIRST: The Order of The Interstate Commerce Commission Does Not Relate to "Transportation."

A close analysis of the statute will demonstrate, we respectfully submit, that the statute in question falls into three parts in fixing the venue in the class of cases involved here. These parts, for convenience sake, might be designated as the first part, the first exception and the second exception. It is clear that a case is taken out from under the first part of the statute if the order does not relate to "transportation." In other words, all orders not relating to transportation are taken from under the first part of the paragraph and the venue is fixed by either the first or second exception.

The paragraph divided into its three parts is as follows:

First Part: The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party, or any of the parties, upon whose petition the order was made.

First Exception: Except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the District where the matter complained of in the petition before the Commission arises.

Second Exception: And except that where the order does not relate either to transportation or to a matter so complained of before the Commission, the matter covered by the order shall be deemed to arise in the District where one of the petitioners in Court has either its principal office or its principal operating office.

In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

Without question Congress, in enacting this elaborate and somewhat complicated provision, endeavored to fix the venue for all kinds of cases brought to enforce, set aside or suspend orders of the Interstate Commerce Commission, so that no case of this nature would fail for want of a venue. It is equally plain that the principal pivotal point upon which the statute turns is the word "transportation," and *that only orders relating to "transportation" fall under the first part of the statute.* All non-transportation orders fall under the exceptions.

In fixing the venue in this case, therefore, our first inquiry is as to whether the order does or does not relate to transportation. The Government, in its plea to the Jurisdiction, asserts that the order in question relates to transportaion, and the venue is in Arizona or Kentucky. We contend that the order does not relate to transportation and the venue is in the Western District of Texas. The issue, then, appears to

involve the meaning of the word "transportation" as used in the paragraph under consideration.

It is an elementary rule applicable here that in the interpretation of statutes words in common use are to be construed in their natural, plain and ordinary signification, and it is equally well settled that so long as the language used is unambiguous, a departure from its natural meaning is not justified by any consideration of its consequences, or of public policy, and it is the plain duty of the Court to give it force and effect.

Lake County v. Rollins, 130 U. S. 662; 9 S. Ct. 651; 32 L. Ed. 1060.

36 Cyc., 1114 and many authorities there cited.

25 R. C. L., p. 988, and many authorities there cited.

Words of a statute are to be taken in their ordinary sense.

Danciger v. Cooley, 248 U. S. 319; 39 Sup. Ct. Rep. 119; 63 L. Ed. 266.

Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and will the meaning commonly attributable to them.

De Graney v. Lederer, 250, U. S. 376; 39 Sup. Ct. Rep. 524; 63 L. Ed. 1042.

An act of Congress must be read according to the natural and obvious import of the language used, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation.

Moore v. United States, 249 U. S. 487; 39 Sup. Ct. Rep. 322; 63 L. Ed. 721.

In pursuance of these well known rules of statutory construction, we submit there should be no dispute as to the ordinary, natural and plain meaning of the word "transportation."

The Standard Dictionary gives us this meaning: "Transportation" is said to be the act of transporting or the state of being transported; conveyance; the carriage of persons or commodities from one place to another.

"Transportation" implies the taking up of persons or property at some point and putting them down at another.

Gloucester Ferry Co. v. Pennsylvania Co., 114 U. S. 196, 203; 5 S. Ct. 826; 29 L Ed. 158.

"Transportation" means carriage from one place to another.

38 Cyc. 947 and authorities there cited.

U. S. v. Hamburg American Line, 159 F. 104, 105; 86 C. C. A. 294.

The word "transportation" is derived from the latin *trans*, over, beyond, *porto*, to carry; to carry over or beyond.

Bouvier's Law Dictionary, Rawle's Edition.

In short, the definitions given above show that the word "transportation" means, in the ordinary acceptation of the term, the act of shipment, of carriage, the taking up of persons or property at some point and putting them down at another.

The view that Congress had in contemplation the ordinary meaning attributable to the word transportation is strengthened by the last sentence in the paragraph under inspection:

"In case such transportation relates to a *through* shipment the term "destination" shall be construed as meaning final destination of such shipment."

By such sentence Congress says as clearly as it was possible to do so that if the *act of carriage* relates to a *through shipment* (a through carriage of goods) the word "destination" shall be construed as meaning final destination of such goods. In other words, Congress in enacting the statute was dealing with the *act of carriage—the shipment* of goods, and in connection with such a shipment endeavored to define the word "destination."

If we go back to the history of the paragraph in question, a flood of light is thrown upon the language, and in our opinion, if there is any doubt as to the meaning of the word "transportation" at this stage of our argument, it is entirely dispelled by the discoveries there.

Prior to the creation of the Commerce Court suits of the nature involved here were brought in the Circuit Courts of the United States.

4 Fed. Stats. Ann. p. 492.

Peoria and Pekin Union Railway Company versus United States, February 1, 1924, advance opinions, 68 L. Ed. 427, note.

By the Act of June 18, 1910, Chap. 309, 36 Stat. L. 539, 5 Fed. Stats. Anno., 2d Ed. p. 1108, the Commerce Court was created and suits to enforce, suspend and set aside orders of the Interstate Commerce Commission were thereafterwards brought in that court, and in that court alone.

A study of the history of the Commerce Court readily shows that such court was created as the outgrowth of a demand on the part of shippers for relief from ills then existing, and was a piece of legislation in the "interest of the public and especially in the interest of the shippers who were seeking to prevent injustice by the railroads." See President Taft's Message vetoing the Act abolishing the Commerce Court, 48th Vol. Congressional Record, p. 11027, 62nd Congress, 2nd Session.

Congress failed to pass the Act abolishing the Court over the Presidential veto during the 62d Congress. When the 63d Congress met, however, there was a unanimity of opinion in Congress that the Commerce Court should be abolished. A number of bills and resolutions were immediately introduced to this end. One of these bills, which embodied word for word, that portion of the Act seeking to abolish the Commerce Court, which had been vetoed by President Taft, was introduced by Mr. Sims. This bill, at the request of the Chairman of the Committee in charge thereof, was then sent to the Attorney General, Honorable John C. McReynolds, now of the Supreme Court, for an opinion and suggestion. The Attorney General on May 6, 1913, sent a written opinion to Mr. Sims

who incorporated it in the Congressional Record, and appears at page 2264 of the Record of the 63d Congress. This letter reads in part:

> "My dear Mr. Sims: As you requested I have considered your bill (H. R. 1921) abolishing the Commerce Court, with a view to giving you some aid about the jurisdiction of the courts. Irrespective of the policy of the measure, upon which I express no opinion, I venture to suggest, in line with your views—
>
> "1. Venue. As drawn, the bill would probably permit the railroads a choice of a considerable number of districts, and I should think it would be desirable to fix the jurisdiction more definitely by law.
>
> "I do not think of any better method than of returning to the method which existed prior to the establishment of the Commerce Court, *which was generally the district in which the complainant resided, or if a corporation, had its principal operating office.* (Italics ours.)

The Chairman of the Committee, Honorable W. C. Adamson, had at this time introduced a resolution having for its purpose the abolishment of the Court. (See p. 2267 of the Congressional Record, 63d Congress, Vol. 50, Part 3).

In this resolution the venue provision for suits thereafter to be brought was as follows:

> "The venue of any suit hereafter brought to enforce, suspend or set aside in whole or in part, any order of the Interstate Commerce Commission shall be in the District where some or all of the transportation covered by the order has either its origin or destination except where the order does not relate to transportation, the venue shall be in the District where the matter complained of in the petition before the Commission arises, except that where the order does not relate either to transportation or to a matter so complained of before the Commis-

sion, the matter covered by the order shall be deemed to arise in the District where one of the petitioners in Court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment."

This resolution was finally attached as a rider to the Urgent Deficiency, Appropriation Bill. See p. 4527, Vol. 50, Part 5, 63d Congress, 1st Session for the Bill. This bill was considered in the Whole House and passed the House on Sept. 9, 1913, the resolution quoted being unchanged. See p. 4620, Vol. 50, Part 5, Congressional Record, 63d Congress.

The House provision in the Deficiency Bill was read in the Senate shortly thereafter. See Vol. 50, Part 5, Congressional Record p. 5407.

On October 3, 1913, Mr. Walsh of Montana pointed out that under the Bill as it came from the House, whenever the carrier was the party appealing to the Courts, it would have the right under the bill to have a review of any adverse order in any District in which the shipment originates or in which it has its termination. (See p. 5413, Congressional Record, Vol. 50, Part 6).

Senator Walsh stated, to illustrate his remarks:

"A petition is filed concerning shipments made from the State of Washington to the State of Minnesota, and the decision is in favor of the petitioners, who reside in the State of Washington. The origin of the transportation is in the State of Washington; the destination is in the State of Minnesota. The decision is in favor of the shipper. The railroad company appeals to the Court from the order of the Commission. The railroad company is

entitled to take its choice of instituting its suit either in the State of Minnesota, or in the State of Washington. If, perchance, the State of Idaho, the State of Montana, or the State of North Dakota, should choose to join with the State of Washington and ask for a *reformation of the rates as they affect all shipments* going into all these States, and the decision accords them the relief which they ask, the railroad company is entitled to take its choice of any one of the District Courts of these States.

"We can not fail to recognize that the railroad companies have their choice among judges, and they would not be actuated by the motives that ordinarily influence the action of men if they did not select the judges whom they thought most favorable to their contention."

On the same legislative day, to-wit: October 3, 1913, at page 5425 of the Congressional Record, appears this:

"Mr. Walsh. Mr. President, before this matter is disposed of I wish to recur for a moment to the subject of venue, to which I referred in my remarks sometime ago.

"I have prepared an amendment which I think will cover the requirements of the case. I do not desire to press it unless the Senate feels that it is desirable to perfect the bill. I feel that to give the carrier an opportunity to make choice of the venue is a privilege which it ought not to be given.

"Mr. Overman. I hope the Senator will introduce his amendment, and I will let it go into conference, and be considered in conference. I will accept it.

"Mr. Walsh. I move then, to strike out all of line 16, page 34, after the word "district," and also all of line 17, to and including the word "destination" and to insert in lieu thereof the following:

"Wherein is the residence of the party or any of the parties upon whose petition the order was made."

"Mr. Overman. I accept that amendment.

"Mr. Walsh. In line 18, after the word "transportation," I move to insert the following:

"or is not made upon the petition of any party."

"Mr. Overman. I accept that.

"Mr. Walsh. Then it will be necessary in order to perfect it, to strike out the sentence commencing on the last line on page 34 and going to and including line 3 on page 35.

"Mr. Overman. I accept that, Mr. President."

There is some suggestion that the amendments offered by Mr. Walsh were recommended by the Attorney General. See p. 1 of Memorandum hereto attached.

The bill was sent to conference and the Senate amendments proposed by Mr. Walsh was agreed to, and the venue pargaraph as we now have it was concurred in. See p. 5516, Congressional Record, Vol. 50, Part 6, 63d Congress.

After the report of the conferees was submitted to both Houses the colloquy took place with reference to the venue statute, in the Senate, which is fully set forth in the memorandum hereto attached. This colloquy appears at pages 5616 et seq. of the Congressional Record, Vol. 50, Part 6, 63d Congress. From the statements of Senators, taken in conjunction with the history above recited, we gather a very definite idea of the intention of Congress, and the evils which the legislation was intended to remedy, although the language used in the venue

provision is somewhat involved and the entire paragraph is loosely worded.

We now see that the word "transportation" as used in the final draft of the venue paragraph was used in the same sense as it was used when placed in the first bill in the House, which provided that the venue should be in the District where some or all of the *transportation* covered by the order had either its origin or destination. "Transportation" as used by the House meant the shipment of goods, and its definition of the word "destination" at the end of the paragraph was for the purpose of obviating the argument that intermediate destinations also fixed venue. The venue was to be in the district of the origin of the shipment and the *final* destination of the shipment. The Senate in amending the House Bill continued the use of the word "transportation" as it had been used by the House, and finally passed the bill with the definition of the word "destination" in it.

The history of the bill, as set out above, also demonstrates in our opinion, that Congress was desirous of taking from the carrier the privilege of selecting its venue, and of placing the venue *at the place of residence of the shipper.* This is made clear by the remarks of Mr. Walsh in connection with his amendments. The bill, as originally drawn, gave an option, in many cases, to the carrier to select a forum which it thought favorable to it. This defect was sought to be changed by the Walsh amendments, so that in the ordinary case arising upon

the complaint of a shipper the suit would have to be brought at the home of the shipper.

The reason for laying the venue at the home of the shipper is obvious, and the same as that expressed by the Circuit Court of Appeals, Fifth Circuit, in the case of the St. Louis Southwestern Ry. Co. v. S. Samuels & Co., 211 F. 588, an action wherein the shipper sued the railroad to enforce a reparation order. The Court in that case there said:

> "Clearly the Legislature did not intend to cover this legislation upon a particular subject by the enactment of the general law. The real reason which doubtless actuated Congress to confer jurisdiction upon the Circuit Court of the District in which the complainants reside, was to provide a means for a shipper to enforce the reparation order for a small amount, as in this case, without having to go 1,000 miles and incur an expense in excess of the amount of the award.
>
> "The legislative body must have known that, in the great majority of cases, orders of reparation would not be for large sums, and that in each instance shippers would start in with a handicap in that the transportation company with its regularly retained corps of attorneys, its free transportation facilities for them, and its witnesses, together with its vast wealth and power, would be able, by declining to pay an order of the Commission, practically to defeat such order, unless the shipper could be brought near enough to a forum where he could enforce such order without being compelled to expend more than the reparation allowed."
>
> "The intention of Congress in regard to venue in cases of this kind is shown by the following from the late act of Congress abolishing the Commerce Court, and transferring jurisdiction to the District Court approved October 22, 1913:

"The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment."

The history of the legislation here under inspection demonstrates that Congress at the inception of the legislation intended to put the venue either at the beginning or the destination of the shipment. It was contemplated that the shipper would complain, in transportation cases, to the Commission and as a result an order against the carrier would go against the carrier, which would seek a review by appealing to the courts. As stated, the carrier was at first given the privilege of selecting its venue. Throught the action of Mr. Walsh in the Senate the House Bill was amended to reverse the venue so that such a suit would lie, not where the carrier might put it as it desired, but at the residence of the shipper who made the complaint in the first instance. In all other cases the venue was where the matter bofore the Commission arose, or where the petitioners in court had their principal place of business.

Congress in passing the venue paragraph in its final form was solicitous for the interests of the shipper and not the railroad, with its vast wealth and power, its free transportation, its staff of regularly retained attorneys, and in approaching the construction of the statute in question we must bear in mind that it is shot through and through with this purpose.

In this case the railroads are insisting that the complaining shippers must go to the domicile of the two corporations, who have been made parties hereto, to maintain their suit. This, we respectfully contend, is contrary to both the letter and the spirit of the paragraph aforesaid.

In this connection, we should bear in mind that the railroad corporations in questions are not necessary parties to this suit. Section 208 of the Judicial Code, 5 Fed. Stats. Ann. (2d Ed.) p. 1110 provides that suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought against the United States and Section 212 of the Judicial Code (5 Fed. Stats. Ann. 2d Ed. p. 1115) provides that communities, associations, corporations, firms and individuals who are interested in the controversy may intervene. The railroad corporations were proper parties and might have intervened after the commencement of the suit, but the principal and only necessary party is the Government. If the complainants had not seen fit to make the railroad corporations parties defendant, could it have been successfully contended that complainants could only sue the Government at the home of the railroads who were not parties to the suit? Be-

cause they were made parties in the first instance should not change the answer to this question.

Now we come to consider whether the present order of the Interstate Commerce Commission relates to "transportation" within the meaning ascribed to that word by Congress if we are correct in our view that "transportation" refers to shipment of goods, then it can be definitely said that the order permitting one carrier to acquire the stock and control of another carrier can not by any stretch of the imagination relate to the shipment of goods.

The paragraph of the section of the Transportation Act of 1920 under which the order complained of herein reads as follows:

> "2. Whenever the Commission is of the opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property, subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any such carrier or carriers, either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquistion, under such rules and regulations and for such consideration, and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

The order of the Interstate Commerce Commission purports to be an order authorizing one carrier to acquire the control of another carrier, and can not be said to refer to, or

to relate to, transportation. Transportation may be indirectly affected but the order primarily is one permitting the merger of two railroad corporations, and relates to the acquisition by one carrier of the control of another carrier, the fusing of one corporation with another—a meaning not comprehended in the word "transportation" as used by Congress. The order covers the transfer of ownership, the issuance of stock and bonds, the acquirement of leases, the transfer of securities and collateral and the like, which matters come under the general definition of *financial transactions* and are apart from matters directly relating to transportation—the shipment of or carriage of goods. The distinction here drawn was made by the Interstate Commerce Commission itself, when, instead of passing the application to the section of the Commission generally handling complaints involving transportation, it assigned the matter to the *Financial Docket,* and the order was issued from the Finance Docket under number 4164. This is similar to a contemporary construction by the Commission itself, which construction is entitled to weight.

If we are correct in our construction of the meaning of the word "transportation" as used by Congress in the paragraph in question, then it is clear that the venue of this suit could not fall under the first part of the paragraph, as that part, as heretofore shown, covers *only transportation orders, and all non-transportation orders fall under one of the exceptions.*

This brings us to a consideration of the exceptions.

SECOND. If there was a matter complained of before the Commission, that matter arose in the Western District of Texas, among others.

The first exception to the venue paragraph is, to say the least, inartistically drawn, but from tne statements of the author of the Senate amendments (Mr. Walsh) as disclosed by the memorandum hereto attached, it is clear that the exceptions were added to fix a venue for cases arising on non-transportation orders, and cases arising on orders initiated by the Commission on its own motion (see p ..... of the memorandum). The first part of the paragraph is intended to cover orders growing out of *complaints* made to the Interstate Commerce Commission by a party. The first exception provision, would apear to be intended to cover *complaints* made against some one by the Commission on its own motion. It is true that the word "petition" is used, but in connection with it is the phrase "complained of in the petition," perhaps showing that Congress was dealing with "complaints" rather than applications or petitions. If the application of the railroad defendants before the Interstate Commerce Commission for an order authorizing the Southern Pacific System to acquire the control of the Southwestern System is to beld a "complaint" then the venue lies where the matter before the Commission arose. As the matter arose in every district where the railroads affected by the order run, it is our opinion that the suit could have been maintained in any one of those districts, including the Western District of Texas, unless the second exception

is deemed to declare, for the purpose of construction, what is meant by the place where the matter arose, in which event, the venue would arise at the home of the plaintiffs—the Western District of Texas.

THIRD. If there was no matter complained of before the Commission, the matter covered by the order is deemed to arise in this district—the residence of the Plaintiff in Court.

If the application of the railroads to the Interstate Commerce Commission for permission to merge, is not a complaint, or a petition complaining of a matter, then the venue of this case falls under the second exception, as an order not relating either to transportation or to a matter complained of before the Commission, in which event the venue is at the residence of the plaintiffs in Court—the Western District of Texas.

It makes little difference in construing the meaning of the two exceptions whether the two exceptions cover the same class of cases, or whether the second exception is intended to cover a class of cases, such as this, which may not have arisen upon complaint. In either event, the result is the same and the venue is in this District. In other words, once it is established that the order herein does not relate to transportation, the venue is taken out from under the first part of the statute and falls under one of the exceptions. If the second exception is merely explanatory of the first exception and was written for the purpose of definitely fixing the *locus* where the matter is deemed to arise, the venue is of necessity here. On the other hand, if the second exception fixes a third class of cases, to-wit:

cases not relating to transportation and not arising upon complaint before the Commission, then the venue is still in the Western District of Texas.

We are not unmindful of the case of Skinner & Eddy Corporation v. United States of America, et al, 63 L. Ed. 772, but it is to be distinguished from the case at bar in our opinion on the ground that that suit was based upon an order growing out of an application for relief from the long-and-short-haul clause in respect to certain west-bound transcontinental rates, a matter directly relating to transportation and involving the shipment of goods and therefore within the first part of paragraph.

SUMMARY

So, in conclusion, we respectfully submit that the pleas to the jurisdiction should have been overruled and the cause permitted to proceed in the manner provided by law. We say, first, that the order of the Commission does not relate to "transportation" within the meaning of the words as used in the statute; second, that, as a consequence, the venue is found under one of the exceptions; that, as a matter not relating to transportation, the venue under any construction to be placed upon the exceptions, arises in the Western District of Texas.

WHEREFORE, premises considered, appellants pray that this cause may be reversed.

Respectfully submitted,

JOS. U. SWEENEY,

EDWARD C. WADE, Jr.,

Postoffice address: El Paso, Texas.

Solicitors for Appellants.

MEMORANDUM

Mr. Overman. I move that the Senate concur in the amendment of the House to the amendment of the Senate Numbered 107.

Mr. Sutherland. Before that motion is put I should like to ask the Senator from North Carolina what was done with amendments 62 and 63, on page 37 of the Senate print?

Mr. Overman. The House receded and those amendments have been concurred in in the report.

Mr. Sutherland. I should like to say to the Senator from North Carolina that as I read the amendment a good deal of confusion is likely to result, particularly from amendment No. 63. The provision as it came from the House was that "the venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district"—

Mr. Overman. I can not understand what theSenator is reading from. Is he reading from page 3763 of the Record?

Mr. Sutherland. I am reading from the Senate print of the bill, page 37.

Mr. Overman. The Senaator is reading beginning in line 13?

Mr. Sutherland. Beginning in line 13.

Mr. Overman. If the Senator pleases, these amendments, I think, were recommended by the Attorney General, and we put them on in the Senate and the House agreed to them.

Mr. Sutherland. I am not preparted to discuss the question as to whether the House provision was wise or whether it should not have been amended as evidently it was intended to be amended, but I think that amendment No. 63 is quite likely to introduce an element of confusion into the matter. Let me finish the reading of the provision from the house, continuing at the point where I was interrupted:

> "Where some or all of the transportation covered by the order, has either its origin or destination, except that where the order does not relate to transportation, the venue shall be in the district where the matter complained of in the petition before the Commission arises."

That is understandable, at any rate, and it is enforcible at any rate. But the Senate introduced, after the word "transportation," the words "or is not made upon the petition of any party," so that in all cases where the order is not made upon the petition of any party the exception which was introduced by the House, "except that where the order does not relate to transportation," does no apply. In other words, where the order is not made upon the petition of any party but relates to transportation, the venue shall be in the district where the matter complained of in the petition before the Commission arises.

Now, a matter relating to transportation may arise in more than one district. For example, articles being transported from Omaha to San Francisco are in transportation judicial districts, and that particular matter will not arise in any particular district but will arise in several districts; and

when you have that kind of a case you have one that will not come with the provision of your law. I don't know whether I make the matter clear or not.

Mr. Overman. I think the Senator is clear about that, and I think probably there ought to be an amendment ,but it is now too late to do anything, because we have agreed to the conference report. That is settled, as far as this bill is concerned.

Mr. Clapp. But we can reconsider the vote.

Mr. Walsh. Mr. President—

The Vice President. Does the Senator from Utah yield to the Senator from Montana?

Mr. Sutherland. I do.

Mr. Walsh. It does not occur to me that the provision needs any further amendment. In any case, the provision to which our attention is now directed by the Senator was in the bill when it came from the House. The Senate acceded to that provision of the bill and added a provision of its own. No question has ever been raised up to the present time touching the feature of the bill to which the Senator from Utah adverts, and it would seem as though the time had quite gone by when any amendment to the bill affecting that particular clause would be properly considered.

I desire to say in this connection, however, it does not occur to me that any difficulty at all will arise under the circumstances such as are mentioned by the Senator. If, indeed, the subject does arise in two or three different States, ob-

viously the venue will be in any one of the States in which the proceeding may be begun; that is to say, if the matter does not relate to transportation or "is not made upon the petition of any party," and it should arise in the States of Utah, Wyoming, and Nebraska, for instance, it seems to me the venue could be laid in any one of these three States.

Mr. Sutherland. I am not at all certain that that is so.

Mr. Poindexter. Mr. President —

The Vice President. Does the Senator from Utah yield to the Senator from Washington?

through several States, therefore through several Federal

Mr. Sutherland. In just a moment. The original House provision, beginning in line 15, reads:

> "Shall be in the judicial district where some or all of the transportation covered by the order has either its origin or destination"—

showing that he house evidently considered that it was necessary, if it so desired to put the venue in any one of several districts, to say so, because they say, "where some or all of the transportation covered" had its origin.

The element of confusion, as I understand it, is introduced by the Senate amendment, which alters the sense of the original House provision, and with that amendment it provides, in substance, that in some cases which relates to transportation the venue shall be in the district where the matter complained of in the petition arose.

Mr. Walsh. I desire to say to the Senator from Utah in

explanation of the Senate amendment, because my recollection is he was not here at the time, that it was suggested upon consideration that under the provision of the bill as it came from the other House the carrier, who under all ordinary circumstances would be the party who would appeal to the Court for relief from any order that was made by the Interstate Commerce Commission, would have an option to lay the venue either in the State in which the transportation originated or in the State in which it terminated, notwithstanding the petitioners would be confined to only one State; in other words, it was not intended to give an option to the carrier to select the venue as his own interest might seem to dictate, but to fix it definitely in the place where was the residence of the petitioners who give rise to the proceedings in the first place.

Mr. Sutherland. Mr. President, I do not care to pursue that matter further; it has probably passed beyond the stage where we can help it, but I—

Mr. Poindexter. Mr. President, before the Senator from Utah leaves that point I think he ought to call attention also to the confusion which is involved in the statement of the class of actions, being those which do not relate to transportation, and cases that do not come up on the petition of any party. Then the language fixes the venue of that class of cases by reference to a matter complained of in the petition before the Commission.

Mr. Sutherland. I was just going to call attention to that.

Mr. Poindexter. The matter complained of in the petition before the Commission is described as that in which there is no petition.

Furthermore, I make this further suggestion: it seems to me if there is any possibility of revising the form of this provision, it ought to be borne in mind. The language goes on to add another class:

> "And except that where the order does not relate either to transportation or to a matter so complained of before the Commission"—

That is exactly the same class that was prescribed in the previous phrase where the number "63" occurs—

> "where the order does not relate to transportation or is not made upon the petition of any party."

That is the same class of cases. Then it goes on to say:

> "And except that where the order does not relate either to transportation or to a matter so complained of"—

That is, upon the petition of the party—

> "the matter covered by the order shall be deemed to rise in the district where any one of the petitioners in Court has either its principal office or its principal operating office."

The language is absolutely conflicting and almost impossible of construction so as to be consistent or coherent.

Mr. Sutherland. I was about to call attention to the very thing of which the Senator from Washington has spoken. The whole trouble arises from the introduction by the Senate of

the amendment. If the Senate had left the House amendment alone, the trouble could not have arisen. The Senate amendment is:

"Or is not made upon the petition of any party."

Having already provided substantively with reference to cases which do not arise upon any petition at all, then it is provided that—

> "the venue shall be in the district where the matter complained of in the petition before the Commission arises."

It is an absolute contradiction in terms. Provision is first made for a case in which there is no petition at all, and then the venue is to be tested by a petition which does not exist.

Mr. Walsh. Mr. President, I think the Senator is quite in error about that. It is the petition of a party. Every proceeding is commended upon petition or it is initiated by the Commission itself. Of course there has got to be some kind of a proceeding; some kind of a basis for it.

Mr. Sutherland. How can there be a petition without a party to the petition?

Mr. Walsh. Because the Interstate Commerce Commission itself may institute proceedings before the Interstate Commerce Commission. Then it is not made on petition.

Mr. Sutherland. Not on petition, certainly. The Interstate Commerce Commission does not petition itself.

Mr. Walsh. The word "petition" there, I apprehend, does not necessarily imply a prayer, because the term, as the

Senator from Utah well knows, is frequently used to signify the declaration of complaint on original proceedings in any cause.

Mr. Sutherland. If a matter comes before the Commission or before a Court upon a motion of the body itself, certainly that matter does not arise by petition; it is a matter that is brought up on the motion of the Court or by the Commission. When we speak of a petition, we necessarily imply a petition of somebody, and that somebody is a party. Then we provide, that in cases of that kind, which do not arise upon petition, the petition, which does not exist, shall govern the matter of venue.

Mr. Overman. Mr. President, there is no question upon this. It is already agreed to. I move—

Mr. Sutherland. I would like to ask the Senator from North Carolina whether it would be possible to reconsider the vote by which amendment numbered 63 was agreed to?

Mr. Overman. No, Mr. President; because the matter has been in conference; it has been agreed to by the House of Representatives, and it is out of our hands. This can be corrected by future legislation if there is any trouble about it, but it can not be now corrected here. It has passed beyond that stage. The language was not put in the bill on the floor of the Senate, but it came from the other body.

Mr. Clapp. While it may be better to let the matter go, to be subsequently corrected, I would not want to sit in the Chamber and be estopped by a declaration that a motion for

the adoption of a conference report is no less subject to reconsideration in this body than any other motion, though I quite agreed with the Senator from North Carolina that perhaps, in view of the situation, it is better to let this go now and correct it by subsequent legislation.

Mr. Martin of Virginia. Mr. President; while there is some little confusion in the language, I don't think there will be any trouble in the proper court taking jurisdiction. I do not believe, as a matter of practice, in the interpretation of this law and its enforcement that there can be any difficulty about a court taking jurisdiction and placing the venue in the place where the matter arose. Although it was not supported by a petition the Court would not be deterred by the inaccurate use of that language without explanation to forego a jurisdiction manifestly intended to be vested in it.

My own judgment is that it will not lead to any serious disturbance in the administration of this law; but, granted, we are consuming time unnecessarily. It is impossible for us to correct this matter now. If this bill were to go back to conference we would be confronted with difficulties. I have no idea that there is a quorum of the House of Representatives in the City of Washington, and it would be absolutely futile for us to throw this bill back into conference unless we intend to indefinitely postpone it.

Mr. Sutherland. Let me ask the Senator from Virginia this question: he thinks it is a matter that would be easily taken care of. The language of the provision now is that

where the order "is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises."

Mr. Martin of Virginia. I think —

Mr. Sutherland. Just a minute. That is the test of jurisdiction or of venue. Let me ask the Senator this question: suppose that an order is made hereafter not upon the petition of any party, where is the venue of that order?

Mr. Martin of Virgina. It will be held where the cause of action arose under it.

Mr. Sutherland. Oh, no; it does not say so.

Mr. Martin of Virginia. I think that is the way the Court would interpret it.

Mr. Sutherland. Where does the Senator find that provision?

Mr. Martin of Virginia. That is, if the Court treated the language "in the petition" as having been obliterated, as having no intelligent application to the case, they would place the venue where the cause of action arose.

Mr. Sutherland. But this is an exception, and it must be tested by its own provision. That exception is that where the order "is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition"—which does not exist—"before the Commission arises."

Mr. Martin of Virginia. My interpretation of the provision that when the order does not relate to transportation or

is not made upon petition of any party the venue shall be is the district where the matter complained of in the petition before the Commission arises, is that they will treat it as if the words "complained of in the petition" were omitted from the statute entirely.

Mr. Poindexter. Mr. President—

Mr. Martin of Virgina. The Court would treat it in fixing the venue as if those words were omitted from the statute, because they can not be controlling, they can not be pertinent, when no petition has been filed. Therefore, the Court would treat those words as omitted and fix the venue in the place where the matter complained of arose. I do not believe that there will be the slightest difficulty in the way of the Court in giving an interpretation that would fix the jurisdiction exactly as the statute intended it to be fixed. It is a little—

The Vice President. Does the Senator from Virginia yield to the Senator from Washington?

Mr. Martin of Virginia. In one moment I will yield to the Senator. It is a little inaccurately expressed; there is a little confusion in the language; I can not undertake to gainsay that; but I believe it is a confusion for which the courts would readily find relief.

Now, I will say to the Senator from Washington that I was occupying the floor by the courtesy of the Senator from Utah (Mr. Sutherland.)

Mr. Poindexter. If the Senator from Utah will allow me, before the Senator from Virginia takes his seat I will say I know courts frequently do relieve statutes of patent inconsistencies by disregarding certain words which have no meaning when the statute can not be construed without such action. The sentence which the Senator has read, it is true, might be so construed, but how would the Senator relieve the embarassment which comes up in the next phrase, which not only includes a word, which is without meaning, but states an exactly opposite contrary venue? The phrase which the Senator has just discussed fixes the venue in the district where the matter arises, if we leave out the words which the Senator says a Court will leave out. The next one fixes it in the same class of cases upon an entirely diferent rule, namely, in the district "where one of the petitioners in Court has either its principal office or its principal operating office"—an exactly opposite rule in the same class of cases. The fact of the case is, there is no occassion at all to have that clause in the statute. It merely repeats a statement of the same class of cases and provides a different venue for them. I would state, merely by way of suggestion, for there is apparently no way of correcting it now, that the provision would be cleared up if you would strike out entirely the words "complained of in the petition before the Commission," and then strike out further, beginning with the word "and," in line 23, the remainder of that line, all of lines 24 and 25, and lines 1 and 2 on page 38, down to the word "office," and including that word in line 3

on page 38. With those words stricken out the provision would be complete and would be perfectly clear.

Mr. Martin of Virginia. The trouble is that the bill is not in the stage—

Mr. Poindexter. If the Senator will allow me to complete my sentence—that would cover every possible case. In the first place, in those cases which arise upon petition the venue would be in the district in which the petitioner resided upon whose petition the order was made, and in those cases which do not relate to transportation, and are not brought upon petition the venue would be where the cause of action arises.

Mr. Borah. Mr. President, I agree with the suggestion of the Senator from Utah (Mr. Sutherland) as to what might be called the ambiguous or unfortunate use of the words referred to, but I am inclined to agree with the Senator from Virginia (Mr. Martin) as to the manner in which the Court would construe the provision. The provision reads:

> "Or is not made upon the petition of any party, the venue shall be in the district where the matter complained of in the petition before the Commission arises."

The words "in the petition" are, of course, in a sense merely explanatory of the complaint. There might not be a technical petition, and yet in contemplation of law there would be a petition in whatever form the matter arose before the Commission, and it seems to me that the Court would not have very much difficulty in arriving at the conclusion that what Congress intended in its unfortunate use perhaps of the language, was that the venue should arise where the subject

matter complained of arose. I think that would be the construction of it.

Now, as to the suggestion which has been made by the Senator from Washington (Mr. Poindexter), I do not exactly catch his suggestion, but the provision goes on to say:

> "And except that where the order does not relate either to transportation or to a matter so complained of before the Commission"—

If it arose out of the proposition covered by neither one of those expressions, then—

> "the matter covered by the order shall be deemed to arise in the destrict where one of the petitioners in Court has either its principal office or its operating office"—

Does the Senator from Washington think that that covers a venue which is not covered by the other proposition at all, because one of the others relates alone to transportation and the other to the matter complained of; but when neither matter is covered; that is to say, where the matter before the Commission relates neither to transportation nor the matter complained of, the venue shall be at the principal place of business.

Mr. Poindexter. Mr. President, it seems to me that it describes the same class of cases described in the clause immediately preceding. I don't see how a matter could be complained of before the Commission unless it is complained of by petition, and in all that class of cases where the complaint is made by petition and where it relates to transportation the venue is stated in amendment No. 62. Where it is not com-

plained of by petition and does not relate to transportation the venue is stated in amendment 63. They cover all cases, but a third venue is stated for the same class of cases.

Mr. Walsh. Mr. President, I want to add just a word with respect to this discussion. The significance of the language is to be determined in connection with the proceedings before the Interstate Commerce Commission. Those proceedings belong to two classes. One class are proceedings that are initiated upon the petition of a party; the other class are proceedings that are initiated by the Interstate Commerce Commission itself. The language was intended to cover the venue of both of those classes.

The first provision covers the cases in proceedings initiated upon the petition of a party in relation to transportation, while the other is intended to cover the cases in proceedings initiated by the Commission itself, and not brought by any party at all. When the Commission itself initiates proceedings it does so upon some foundation, some charge, some writing. That may not be properly denominated by the word "petition," but no one doubts what the significance of the word there is. Exactly the same difficulty would arise if you should cut out the words "of the petition" and should say that "the venue shall be where the matter complained of arose," but inasmuch as no one has filed any technical complaint you might say that the matter is not complained of. Of course if you give an exceedingly technical meaning to the language there could be no complaint without a party who is complaining, and yet the word "petition" is frequently used—and used in many

of the code states—simply to designate the initial pleading upon which the proceedings are instituted, and that is undoubtedly what it means here.

Mr. Sutherland. Mr. President, it may be that the courts will come to relieve this situation and straighten out this matter. As has been said by the Chairman of the Committee, the matter has passed the point where this body can do anything about it; but I can not let the matter be finally disposed of without saying that it is a piece of exceedingly loose legislation. It is so unhappily worded and there is so much confusion in it that a responsible legislative body like the Senate of the United States ought to be ashamed to let it go upon the statute books.

Mr. Overman. I will say to the Senator that if he feels that way about it it is his duty, as a member of the Senate, to introduce a resolution to correct it. It can be done in that way.

Mr. Cummins. Mr. President, may I ask the Senator from North Carolina whether the amendment No. 61 has passed beyond consideration here?

Mr. Overman. Yes. Does the Senator wish to know what has been done with the amendment?

Mr. Cummins. I should like to know.

Mr. Overman. The House agreed to the Senate amendment introduced by the Senator from Montana (Mr. Walsh), which struck out those lines.

Mr. Cummins. So it has really gotten beyond the jurisdiction of the Senate?

Mr. Overman. Yes.

Mr. Martin of Virgina. Absolutely.